

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE NO. 2011-0093

Appellee, :

vs. :

DONALD J. KETTERER, : {Capital Case}

Appellant. :

On Appeal from the Court of Common Pleas,
Butler County, Ohio Case No. CR2003-03-0309

MERIT BRIEF OF APPELLEE STATE OF OHIO

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STATEMENT OF THE CASE

Procedural Posture:

This appeal is from the judgment of the Court of Common Pleas of Butler County, Ohio, wherein Defendant-Appellant, Donald J. Ketterer, was resentenced after this Honorable Court remanded the case for the proper imposition of postrelease control. (Priority Judgment of Conviction Entry ("Entry"), filed on December 7, 2010)

Statement of Facts:

On January 24, 2004, Appellant waived his right to a jury trial and pled guilty to Aggravated Murder with three death penalty specifications, Aggravated Robbery, Aggravated Burglary, Grand Theft of a Motor Vehicle, and Burglary, which the three-judge panel accepted. (Guilty Plea) After a three-day sentencing hearing, the three-judge panel unanimously concluded that the aggravating circumstances of which Appellant was found guilty outweighed the mitigating factors beyond a reasonable doubt and imposed a sentence of death. (Verdict, filed on February 4, 2004; Sentencing Opinion, filed February 13, 2004) Appellant directly appealed his convictions and sentences. This Court overruled Appellant's assignments of error and affirmed his convictions and death sentence. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48.

On April 18, 2007, however, this Court remanded the case to the lower court for resentencing on the noncapital offenses pursuant to its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. *Case Announcements*, 2007-Ohio-1722. On May 29, 2007, Appellant's first resentencing hearing was conducted for his noncapital offenses where the lower court imposed the same sentences as it had three years prior. (Re-Sentencing

Judgment of Conviction, filed on May 29, 2007) Appellant appealed the lower court's resentencing decision to this Court. In the second appellate decision, this Court sustained Appellant's first proposition of law and held:

Effective July 11, 2006, R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of postrelease control. In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus, this court held: "For criminal sentences imposed on or after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191." Neither of the parties has addressed the application of R.C. 2929.191 as a remedy in this case. However, R.C. 2929.191 applies to Ketterer because his resentencing hearing occurred after July 11, 2006. See, e.g., *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶1214.

Because the trial court failed to properly impose postrelease control, the case is remanded so that Ketterer may be given the proper terms of postrelease control pursuant to R.C. 2929.191.

State v. Ketterer, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶¶72, 84.

Based on this Court's remand order, Appellant's second resentencing hearing was conducted on December 2, 2010. (*Resentencing Hearing ("RS")*, T.p. 1-19) At the hearing, the presiding judge informed Appellant and his counsel that "[i]t is the intention of the Court to reimpose the sentences that were previously given by this Court in counts 2 through 5 and to explain mandatory and optional post-release control." (RS, T.p. 10)

Appellant's counsel, however, attempted to argue that the lower court "does have discretion, not with respect to the post-release control, but to the underlying sentence[,]" and requested that the lower court "take cognizance of the fact of Mr. Ketterer's severe mental health limitations best pointed out by the Ohio Supreme Court in his initial appeal to that court, and that Mr. Ketterer -- and Mr. Ketterer, since he's been confined for what would be seven years now, informs me that he has not received any tickets, so he's been of good

behavior.” (SH, T.p. 11)

The lower court then reminded Appellant and his counsel that the “case has been remanded back from the Supreme Court for the limited purposes of resentencing on Counts 2 through 5.” (Id.) The lower court then proceeded to sentence Appellant to the same prison terms as it had in the two previous sentencing hearings. (SH, T.p. 11-16) However, in this hearing, the trial court imposed the proper postrelease control. For counts two and three, Aggravated Robbery and Aggravated Burglary, respectively, the trial court informed Appellant that the sentence carries a mandatory five years of postrelease control. (SH, T.p. 11-12) As to counts four and five, Grand Theft of a Motor Vehicle and Burglary, respectively, the trial court informed Appellant that the sentence carries a discretionary three year postrelease control. (SH, T.p. 12-13)

The lower court then explained postrelease control in detail:

Sir, if something shall happen that the murder charge totally goes away and you are serving a sentence on the other counts, on the counts where I told you that there is mandatory post-release control, at the time you are released, the prison system, the Ohio Department of Rehabilitation and Control, must impose post-release control on you in which case you would have to report to a parole officer for five years, and you would have to do whatever they tell you to do.

On Count 4, it's optional whether they place you on post-release control. And since it's optional, they may not do it on that count. Let's say Counts 2 and 3 went away so you just have the others, okay. They may decide not to do it. They may decide to only do it for three months. They may decide to do it for six months or they may decide to do it for the full three years.

And that also applies to the -- to Count 5 it's also three years of optional post-release control, and it's their decision on that.

(SH, T.p. 13-15)

The judgment of conviction entry also correctly reflected the lower court's proper imposition of postrelease control:

It is ORDERED as to Count Two that the Defendant be sentenced to be imprisoned for a stated prison term of nine (9) years and pay a fine of two thousand (\$2,000.00) dollars, which sentence carries five (5) years mandatory post release control pursuant to 2967.28(B)(1).

It is FURTHER ORDERED as to Count Three that the Defendant be sentenced to be imprisoned for a stated prison term of nine (9) years, which term of imprisonment shall be served consecutively with the term of imprisonment heretofore imposed as to Count Two, and pay a fine of two thousand (\$2,000.00) dollars, which sentence carries five (5) years mandatory post release control pursuant to 2967.28(B)(1).

It is FURTHER ORDERED as to Count Four that the defendant be sentenced to be imprisoned for a stated prison term of seventeen (17) months, which term of imprisonment shall be served concurrently with the terms of imprisonment heretofore imposed as to Counts Two and Three, and which sentence carries discretionary three (3) years post release control pursuant to 2967.28(C).

It is FURTHER ORDERED as to Count Five that the Defendant be sentenced to be imprisoned for a stated prison term of four (4) years, which term of imprisonment shall be served consecutively with the terms of imprisonment heretofore imposed as to Counts Two and Three, and pay a fine of one thousand (\$1,000.00) dollars, which sentence carries discretionary three (3) years post release control pursuant to 2967.28(C).

(Entry, pages 2-3) (emphasis removed)

ARGUMENT

Proposition of Law I:

A Defendant is not entitled to discovery pursuant to Crim.R. 16 when an appellate court has remanded the case for resentencing for the limited purpose of imposing the proper postrelease control.

In Appellant's first proposition of law he claims that the trial court erred when it denied his motion for discovery, which he filed three days prior to his third sentencing hearing. The State disagrees.

First, the State had already provided Appellant with the discovery he requested before his original sentencing hearing in February 2004. Appellant in his motion for discovery filed on November 29, 2010, requested his statements, his criminal record, all laboratory and hospital reports, results of physical or mental examinations, evidence favorable to him, and reports from peace officers. (Donald Ketterer's Motion For Discovery, filed on November 29, 2010) The State had already provided Appellant these documents prior to his admission of guilt on January 28, 2004. (State's response to discovery filed on March 12, March 18, April 28, June 6, June 11, June 20, June 23, July 17, November 5, December 10, December 29, 2003; January 6, January 12, January 16, January 23, January 26, January 28, 2004)

Second, contrary to Appellant's argument, Crim.R. 16 does not require discovery at resentencing hearings that were remanded to the lower court for the imposition of the proper term of postrelease control. Crim.R. 16(B)(7) provides that the prosecuting attorney shall provide copies of "[a]ny written or recorded statement by a witness **in the state's case-in-chief**, or that it reasonably anticipates calling as a witness **in rebuttal**." (Emphasis added) Thus, by the plain language of the rule, the State is only required to provide witness

statements of those witnesses it intends to call during its case-in-chief or in rebuttal, which occurs at trial, not a resentencing hearing. In addition, the staff notes to division (B) of Crim.R. 16 state that “[a]ll disclosures must be made prior to trial.” As such, discovery must be completed prior to trial.

Resentencing occurs after trial is completed; thus discovery is not required. Moreover, in this case resentencing was conducted for a limited purpose. In the matter at bar, the case was remanded “so that Ketterer may be given the proper terms of postrelease control pursuant to R.C. 2929.191.” *Ketterer*, 2010-Ohio-3831, ¶82. As such, pursuant to this Honorable Court’s decision in *State v. Fischer*, the new sentencing hearing is “limited to proper imposition of postrelease control.” *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶29. In *Fischer*, this Court reaffirmed “the portion of the syllabus in *Bezak* that states ‘[w]hen a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void,’ but with the added proviso that **only the offending portion of the sentence is subject to review and correction.**” *Fischer*, 2010-Ohio-6238, ¶27 (emphasis added).

Therefore, pursuant to the plain language of Crim.R. 16, the staff notes to the rule, and this Court’s decision in *Fischer*, discovery is not required for resentencing hearings limited to the proper notification and imposition of postrelease control. As such, Appellant’s first proposition of law should be overruled.

Proposition of Law II:

Aggravated robbery, aggravated burglary, and aggravated murder are not allied offenses of similar import.

In his second proposition of law, Appellant argues that the aggravated robbery and aggravated burglary offenses were allied offenses with respect to the capital murder offense. The State disagrees.

In *State v. Bezak*, this Honorable Court held that a sentence which does not include the statutorily mandated term of postrelease control must be remanded and a new sentencing hearing shall be conducted. *Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. In *State v. Fischer*, this Court modified its decision in *Bezak* and held that the “[t]he new sentencing hearing *** is limited to proper imposition of postrelease control[,]” where “only the offending portion of the sentence is subject to review and correction.” *Fischer*, 2010-Ohio-6238, paragraph two of the syllabus, ¶127. Further, this Court concluded that “[t]he scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing.” *Id.*, paragraph four of the syllabus.

In the matter at bar, the case was remanded “so that Ketterer may be given the proper terms of postrelease control pursuant to R.C. 2929.191.” *Ketterer*, 2010-Ohio-3831, ¶182. Thus, the resentencing hearing was for a limited purpose in that only “the offending portion of the sentence is subject to review and correction.” *Fischer*, 2010-Ohio-6238, ¶127. As such, the trial court was limited to only correcting the notification and imposition of postrelease control. Therefore, even if Appellant had argued that aggravated robbery and aggravated burglary offenses were allied offenses with respect to the capital murder offense at the

resentencing hearing, the trial court would not have had the authority to address that issue. See, *State v. Grooms*, 9th Dist. No. 25819, 2011-Ohio-6062, ¶16 (“The trial court must conduct a new sentencing hearing, but the hearing must be ‘limited to [the] proper imposition of post[-]release control.’ *Fischer* at paragraph two of the syllabus. ‘[A]ny additional action taken by the trial court with respect to the sentence is a nullity.’ *State v. Stiggers*, 9th Dist. No. 25486, 2011-Ohio-4225, at ¶6”); See, also, *State v. Cline*, 11th Dist. Nos. 2010-G-2981, 2010-G-3000, 2011-Ohio-3890, ¶18 (“Thus, only the post-release portions of appellant’s sentence and judgment entry can be considered void and only those portions need to be addressed by the trial court on remand.”)

Moreover, this Honorable Court had already decided this issue, where in the original appellate decision, this Court concluded that “we have consistently held that ‘[a]ggravated burglary and aggravated robbery are separate offenses and constitute separate aggravating circumstances because they do not arise from the same act. *State v. Williams* (1996), 74 Ohio St.3d 569, 580, 660 N.E.2d 724. *** As we recently held in *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶68, ‘[t]he aggravated-burglary and aggravated robbery specifications were also not subject to merger, since they were committed with separate animus. The burglary was complete as soon as [the defendant] entered the apartment by deception with the intent to commit a theft offense. [The defendant] then attempted to rob [the victims]. *** Thus, the aggravated burglary and aggravated robbery were separate offenses and constituted separate aggravating circumstances because they did not arise from the same act.’ Accordingly we reject proposition VI.” *Ketterer*, 2006-Ohio-5283, ¶¶118-119.

Even if this Honorable Court decides that the issue of allied offenses should be addressed again here, this Court's decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, does not change the outcome. Plain error analysis is required in this case since Appellant failed to raise the issue of allied offenses at the resentencing hearing held on December 2, 2010. "An alleged error is plain error only if the error is 'obvious,' *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, and 'but for the error, the outcome of the trial clearly would have been otherwise.' *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus. Notice of plain error 'is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' *Id.* at paragraph three of the syllabus." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶108. No plain error occurred in this case by the trial court's reimposition of Appellant's original sentences.

In *Johnson*, this Court held that "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Johnson*, 2010-Ohio-6314, paragraph one of the syllabus. As previously stated, this Court did consider Appellant's conduct and his animus when it overruled this exact assignment of error in the first appeal. *Ketterer*, 2006-Ohio-5283, ¶¶117-119.

According to Appellant's confession, he "went to Sanders's home on Shuler Avenue in Hamilton, Ohio, on February 24, 2003, to borrow \$200 so he could pay a court fine. Ketterer claimed that Sanders 'swore up and down to [him] that he did not have the money' and asked Ketterer to leave. Ketterer felt that Sanders 'was being very disrespectful,' and he hit Sanders in the head with a skillet three times. Ketterer remembered thinking, '[I]f I just knocked him

out, he would know who did it, so I thought I should stab him,' which Ketterer did. Ketterer further stated that after Sanders 'quit moving,' Ketterer took \$60 to \$70 out of Sanders's wallet, searched the house for money, and found loose and rolled coins. Then he drove away in Sanders's 1995 Pontiac Grand Am." *Id.* at ¶12. Sanders "had died of 'multiple traumatic injuries,' including 'a severe craniocerebral injury with extensive skull fractures,' nine distinct 'stab wounds with penetration *** of the left lung,' and 'multiple bilateral rib fractures.' In addition, 'two forks, a knife, and a pair of scissors' had been stuck in Sanders's face. Dr. Swinehart also discovered multiple defensive wounds on Sanders's hands and arms." *Id.* at ¶18.

Thus, by Appellant's own admission, when Sanders asked him to leave, he struck him with the skillet three times, but then feared identification. So Appellant decided to stab the victim multiple times. Appellant then took money from Sanders pockets, but that was not enough. Appellant searched the house for more items to take and then drove away in Sanders car. Therefore, Appellant committed these acts with a separate animus for each. As such, even under a *Johnson* analysis, Appellant's offenses are not allied.

Furthermore, recently this Honorable Court declined to merge specifications in two capital murder cases. In *State v. Hunter*, this Court affirmed Hunter's convictions of aggravated murder, rape, and child endangering. *State v. Hunter*, 2011-Ohio-6524, 2011 WL 6376710, ¶¶11, 34, 208 (December 20, 2011). Hunter was sentenced to death "based on two death-penalty specifications: R.C. 2929.04(A)(7) (aggravated murder while committing or attempting to commit rape) and 2929.04(A)(9) (aggravated murder of a child under the age of 13)." *Id.* at ¶11. In addition, this Court on July 28, 2011, upheld Short's conviction of aggravated murder

with the specification of committing the murder while committing aggravated burglary, and his conviction of aggravated burglary. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶¶35, 36, 37, 165. Therefore, as these cases demonstrate, even under *Johnson*, a defendant with separate animus can be convicted of the underlying offenses as well as the capital murder offense.

Wherefore, Appellant's argument is without merit as the trial court only had authority to review and correct the postrelease control notification, this Court had already rejected this exact argument in the first appeal, and even under *Johnson*, Appellant committed each act with separate animus. As such, this Honorable Court should overrule Appellant's second proposition of law.

Proposition of Law III:

The lower court did not order postrelease control to be consecutive.

In proposition of law three, Appellant claims that the three-judge panel imposed consecutive terms of postrelease control. The State disagrees.

At the resentencing hearing, the three-judge panel informed Appellant of the mandatory five year postrelease control for his convictions to counts two and three, first degree felonies, and informed him of the optional three year postrelease control for his convictions to counts four and five, fourth and third degree felonies respectively. (RS, T.p. 13-15) What is critical is that at the hearing, the three-judge panel made it clear that the mandatory five year postrelease control will apply only if the murder charge is vacated and Appellant is released from prison. (SH, T.p. 13) Further, the three-judge panel also informed Appellant that the three year optional postrelease control will apply only if counts two and three, in which postrelease control is mandatory, are discharged and he is released based on the convictions on counts four and five. (SH, T.p. 14) Specifically the three-judge panel stated:

Sir, if something shall happen that the murder charge totally goes away and you are serving a sentence on the other counts, on the counts where I told you that there is mandatory post-release control, at the time you are released, the prison system, the Ohio Department of Rehabilitation and Control, must impose post-release control on you in which case **you would have to report to a parole officer for five years**, and you would have to do whatever they tell you to do.

On Count 4, it's optional whether they place you on post-release control. And since it's optional, they may not do it on that count. **Let's say Counts 2 and 3 went away so you just have the others**, okay. They may decide not to do it. They may decide to only do it for three months. They may decide to do it for six months or they may decide to do it for the full three years.

(SH, T.p. 13-14) (emphasis added)

The three-judge panel in explaining the consequences of violating postrelease control

did use the term consecutive:

JUDGE ONEY: *** They can send you back on in increments of 30, 60, 90 days. They can send you back for nine months at any one point in time. And they can impose additional time on you such that on Count 2 on a nine-year sentence, they could send you back for a total additional time of four and a half years. Do you understand that?

THE DEFENDANT: Yes.

JUDGE ONEY: So you could end up doing 13 and a half years on Count 2.

THE DEFENDANT: Right.

JUDGE ONEY: And the same thing applies on Count 3. Do you understand that? And that's consecutive, so they could give you additional time on that.

Once again, if you mess up, if you don't report to your parole officer, you test positive for drugs or alcohol, you commit a new offense and don't do a program they tell you to do or you do something else that you're not supposed to do, they can send you back for a total amount of one-half of the sentence on this, 17 months. Do you understand that?

THE DEFENDANT: Okay.

JUDGE ONEY: If you commit -- if you're on post-release control and you commit a new felony, a greater sentence could be imposed by the Court. They can impose an additional sentence of up to a year.

JUDGE SAGE: No. The remaining balance of the post-release control period for one year, whichever is greater, can be imposed as an additional prison term if you commit a new felony while you're on post-release control.

JUDGE ONEY: And that's consecutive. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

(SH, T.p. 14-16)

The lower court's use of the term consecutive is correct in that a violation of postrelease control will result in additional prison term to be served separate to the original prison term for that offense. The interpretation of the lower court's use of the word consecutive, however, is irrelevant. It is well-established that a court speaks only through its journal entry and not by oral pronouncement or through decisions. *Schenley v. Kauth*, 160 Ohio St. 109, 113 N.E.2d 625 (1953). Moreover, "[t]he oral announcement of a judgment or decree by the trial court binds no one. It is axiomatic that the court speaks from its journal.

Any other holding would necessarily produce a chaotic condition.” *Brittman v. Brittman*, 129 Ohio St. 123, 127, 194 N.E. 8 (1934).

In the judgment of conviction entry, the term consecutive is not mentioned as to postrelease control. Rather, for each conviction, the lower court informed Appellant of the duration of postrelease control and whether it was mandatory or optional:

It is ORDERED as to Count Two that the Defendant be sentenced to be imprisoned for a stated prison term of nine (9) years and pay a fine of two thousand (\$2,000.00) dollars, which sentence carries five (5) years mandatory post release control pursuant to 2967.28(B)(1).

It is FURTHER ORDERED as to Count Three that the Defendant be sentenced to be imprisoned for a stated prison term of nine (9) years, which term of imprisonment shall be served consecutively with the term of imprisonment heretofore imposed as to Count Two, and pay a fine of two thousand (\$2,000.00) dollars, which sentence carries five (5) years mandatory post release control pursuant to 2967.28(B)(1).

It is FURTHER ORDERED as to Count Four that the defendant be sentenced to be imprisoned for a stated prison term of seventeen (17) months, which term of imprisonment shall be served concurrently with the terms of imprisonment heretofore imposed as to Counts Two and Three, and which sentence carries discretionary three (3) years post release control pursuant to 2967.28(C).

It is FURTHER ORDERED as to Count Five that the Defendant be sentenced to be imprisoned for a stated prison term of four (4) years, which term of imprisonment shall be served consecutively with the terms of imprisonment heretofore imposed as to Counts Two and Three, and pay a fine of one thousand (\$1,000.00) dollars, which sentence carries discretionary three (3) years post release control pursuant to 2967.28(C).

(Entry, pages 2-3) (emphasis removed)

The judgment of conviction entry also included language pertaining to the consequences of violating postrelease control:

The Court has notified the Defendant about the terms of post release control as previously indicated, and the Court also advised the Defendant of the consequences for violating conditions of post release control imposed by the parole Board under Revised Code Section 2967.28, and that the Parole Board may impose a prison terms of up to one-half of the prison term originally imposed on the offender if he violates supervision or a condition of post release control. The Defendant is ordered to serve as part of his sentence any term of

post release control imposed by the Parole Board, and any prison term for violation of that post release control.
(Entry, pages 3-4) (emphasis added)

Appellant argues that the (s) in the language “prison terms of up to one-half” demonstrates that the lower court ordered a consecutive postrelease control in violation of this Court’s decision in *Durain v. Sheldon*, 122 Ohio St.3d 582, 2009-Ohio-4082, 913 N.E.2d 442. Appellant is correct that periods of postrelease control cannot be imposed consecutively. However, Appellant’s argument that the word “terms” in the entry implicates consecutive periods of postrelease control is without merit.

This Honorable Court’s decision in *State v. Johnson* is instructive. *Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69, 880 N.E.2d 896. In *Johnson*, this Court addressed the issue of whether “R.C. 2929.13(F) required the mandatory prison terms for certain serious offenses, including rape, be imposed consecutively.” *Johnson*, 2008-Ohio-69, ¶1. R.C. 2929.13(F) included the statutory language that “the court shall impose a prison term or **terms**[.]” *Id.* at ¶9 (emphasis added). This Court held that the word “terms” did not indicate a legislative intent for the sentences to be served consecutively. *Id.* at ¶1. Specifically this Court stated that:

The word “consecutive” does not appear in the statute.

*** However, while R.C. 2929.13(F) reveals the intent of the legislature that a sentencing court impose mandatory prison terms for the enumerated offenses, our review of that statute reveals no language demonstrating any legislative intent to require a sentencing court to impose those terms consecutively to each other or to any other sentences. Therefore, we hold that R.C. 2929.13(F) does not require a sentencing court to impose consecutive sentences for multiple rape convictions.

Id. at ¶¶16-17.

Similarly in the case at bar, the judgment of conviction entry does not include the word “consecutive” as to postrelease control. Further, the use of the word “terms” does not indicate

that postrelease control was imposed consecutively, especially when the entry equally included the words “term” and “terms” twice. (Entry, pages 3-4) Moreover, the entry included the specific language that “[t]he Defendant is ordered to serve as part of his sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control.” (Entry, page 3) This language demonstrates that only one term of postrelease control will be imposed. In addition, contrary to Appellant’s argument, the “a” before “prison terms of up to one-half” is not the typographical error, but rather the “s” in terms is.

As such, pursuant to this Court’s interpretation of the word “terms” in *Johnson*, this Honorable Court should overrule Appellant’s third proposition of law.

Proposition of Law IV:

A trial court does not have the authority to change an original sentence that included fines when the case was remanded for resentencing for the limited purpose of imposing the proper term of postrelease control.

In proposition of law four, Appellant argues that the lower court erred when it ordered Appellant to pay fines. The State disagrees.

The resentencing hearing held on December 2, 2010, was conducted pursuant to this Honorable Court's remand "so that Ketterer may be given the proper terms of postrelease control pursuant to R.C. 2929.191." *Ketterer*, 2010-Ohio-3831, ¶184. This Court has held that when a case is remanded for the proper imposition of postrelease control, "only the offending portion of the sentence is subject to review and correction." *State v. Fischer*, 2010-Ohio-6238, ¶127. Applying this Court's decision in *Fischer*, the Eleventh District Court of Appeals has held that "only the post-release portions of appellant's sentence and judgment entry can be considered void and only those portions need to be addressed by the trial court on remand." *State v. Cline*, 11th Dist. Nos. 2010-G-2981, 2010-G-3000, 2011-Ohio-3890, ¶18; See, also, *State v. Turner*, 11th Dist. Nos. 2010-A-0034, 2010-A-0039, 2010-A-0040, 2011-Ohio 2993.

The Ninth District Court of Appeals has similarly held that "[b]ecause the remainder of a defendant's sentence is not void as a result of any post-release control defect, a trial court's jurisdiction in resentencing a defendant is limited. *State v. West*, 9th Dist. No. 25748, 2011-Ohio-4941, at ¶4-5. The trial court must conduct a new sentencing hearing, but the hearing must be 'limited to [the] proper imposition of post[-]release control.' *Fischer* at paragraph two of the syllabus. '[A]ny additional action taken by the trial court with respect to the sentence

is a nullity.’ *State v. Stiggers*, 9th Dist. No. 25486, 2011-Ohio-4225, at ¶6.” *State v. Grooms*, 9th Dist. No. 25819, 2011-Ohio-6062, ¶6.

This Court has also held that “[a]lthough the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.” *Fischer*, 2010-Ohio-6238, paragraph three of the syllabus. “[U]nder the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.” *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus (1967).

In the case at bar, Appellant’s resentencing hearing was limited to the proper notification and imposition of postrelease control. Thus, pursuant to this Court’s decision in *Fischer* and the doctrine of res judicata, the trial court did not have the authority to review or correct the prison term sentences, the fines or court costs. At the resentencing hearing, the trial court imposed the same fines as it had done in the original sentencing hearing held on February 4, 2004, and at the resentencing hearing held on May 24, 2007. This Honorable Court in the previous two appellate cases affirmed the fines imposed by the lower court. See, *Ketterer*, 2006-Ohio-5283; See, also *Ketterer*, 2010-Ohio-3831.

As such, because the trial court did not have the authority to correct or modify the fines, it was not required to consider Appellant’s present and future ability to pay the amount

pursuant to R.C. 2929.18(B)(6). Therefore, Appellant's argument is without merit. The trial court simply imposed the same fines as in the previous sentences that have been affirmed by this Court. Therefore, this Honorable Court should overrule Appellant's fourth proposition of law.

Proposition of Law V:

Appellant waived the issue of costs; however, even if this Honorable Court finds that the issue was not waived, the trial court did not have the authority to correct or modify the cost order.

In proposition of law five, Appellant argues that the lower court erred when it imposed court costs without first addressing Appellant. The State disagrees.

Appellant has waived the issue since at the resentencing hearing held on December 2, 2010, he failed to object to the imposition of court costs. In *State v. Lang*, this Honorable Court held that “Lang’s failure to object has waived this issue. See *State v. Threat*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶123 (motion to waive costs must be made at time of sentencing to preserve issue for appeal).” *Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶1108.

Even if this Court finds that Appellant has not waived the issue, the lower court did not err because it did not have the authority to review or correct court costs. See, *Fischer*, 2010-Ohio-6238, ¶127; *State v. Cline*, 2011-Ohio-3890, ¶118; See, also, *State v. Grooms*, 9th Dist. No. 25819, 2011-Ohio-6062, ¶16. Appellant’s case was remanded for the limited purpose of proper notification and imposition of postrelease control. *Ketterer*, 2010-Ohio-3831, ¶184. Thus, the trial court imposed the same costs as it had done in the previous sentences, which this Court has affirmed in the previous two appellate cases. See, *Ketterer*, 2006-Ohio-5283; See, also *Ketterer*, 2010-Ohio-3831. As such, the lower court was not required to address Appellant regarding costs and Appellant’s reliance on *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, is misplaced.

In *Joseph*, the case was remanded by the federal district court ordering that Joseph’s

“death sentence be set aside and that he be re-sentenced according to the statutory guidelines for aggravated murder in the absence of a capital specification[.]” *Id.* at ¶¶13-4. Thus, Joseph was entitled to a de novo sentencing hearing.

In the case at bar, however, Appellant’s case was remanded solely for the proper imposition of postrelease control, which in turns means that this Court’s decision in *Fischer* is controlling. *Fischer*, which was decided more than nine months after *Joseph*, held that “the portion of the syllabus in *Bezak* that states ‘[w]hen a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void,’ but with the added proviso that **only the offending portion of the sentence is subject to review and correction.**” *Fischer*, 2010-Ohio-6238, ¶127 (emphasis added). As such, Appellant’s resentencing hearing was limited to reviewing and correcting the imposition of postrelease control, not court costs.

Therefore, the lower court did not have the authority to address costs at resentencing pursuant to *Fischer* and the doctrine of res judicata¹. Wherefore, this Honorable Court should overrule Appellant’s fifth proposition of law.

1. In *Fischer*, this Court held that “[a]lthough the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.” *Fischer*, 2010-Ohio-6238, paragraph three of the syllabus. “[U]nder the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.” *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

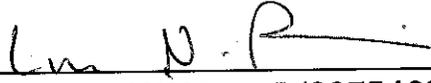
CONCLUSION

For the foregoing reasons, Appellant's sentences should be affirmed.

Respectfully submitted,

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Butler County Prosecuting Attorney

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Assistant Prosecuting Attorney
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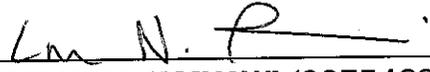
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PROOF OF SERVICE

This is to certify that copies of the foregoing Brief of Appellee was served upon:

RANDALL L. PORTER
Assistant State Public Defender
250 E. Broad St. Suite 1400
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Attorney for Appellant, by ordinary U.S. mail this 7th day of February, 2012.



LINA N. ALKAMHAWI (0075462)
Assistant Prosecuting Attorney

APPENDIX

Ohio Rules**OHIO RULES OF CRIMINAL PROCEDURE**

As amended through July 1, 2011

Rule 16. Discovery and Inspection

(A) Purpose, Scope and Reciprocity. This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) Discovery: Right to Copy or Photograph. Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

- (1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;
- (2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;
- (3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;
- (4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;
- (5) Any evidence favorable to the defendant and material to guilt or punishment;
- (6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;
- (7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

(C) Prosecuting Attorney's Designation of "Counsel Only" Materials. The prosecuting attorney may designate any material subject to disclosure under this rule as "counsel only" by stamping a prominent notice on each page or thing so designated. "Counsel only" material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, "counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the "counsel only" material to the defendant.

(D) Prosecuting Attorney's Certification of Nondisclosure. If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

A-1

- (1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;
- (2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;
- (3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;
- (4) The statement is of a child victim of sexually oriented offense under the age of thirteen;
- (5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney's certification shall identify the nondisclosed material.

(E) Right of Inspection in Cases of Sexual Assault.

(1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

(F) Review of Prosecuting Attorney's Certification of Non-Disclosure. Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an in camera hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.

(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

(G) Perpetuation of Testimony. Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(H) Discovery: Right to Copy or Photograph. If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

- (1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;
- (2) Results of physical or mental examinations, experiments or scientific tests;
- (3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;
- (4) All investigative reports, except as provided in division (J) of this rule;
- (5) Any written or recorded statement by a witness in the defendant's case-in- chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

(I) Witness List. Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

(J) Information Not Subject to Disclosure. The following items are not subject to disclosure under this rule:

- (1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;
- (2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim. R. 6;
- (3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

(K) Expert Witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

(L) Regulation of discovery.

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(2) The trial court specifically may regulate the time, place, and manner of a pro se defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

(M) Time of motions. A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

History. Effective: July 1, 1973; amended effective July 1, 2010.

Note:

Staff Note (July 1, 2010 Amendments)

Division (A): Purpose, Scope and Reciprocity

The purpose of the revisions to Criminal Rule 16 is to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to be exchanged between the parties. Nothing in this rule shall inhibit the parties from exchanging greater discovery beyond the scope of this rule. The rule accelerates the timing of the exchange of materials, and expands the reciprocal duties in the exchange of materials. The limitations on disclosure permitted under this rule are believed to apply to the minority of criminal cases.

The new rule balances a defendant's constitutional rights with the community's compelling interest in a thorough, effective, and just prosecution of criminal acts.

The Ohio criminal defense bar, by and through the Ohio Association of Criminal Defense Lawyers and prosecutors, by and through the Ohio Prosecuting Attorneys Association, jointly drafted the rule and submitted committee notes to the Commission on the Rules of Practice and Procedure. The Commission on the Rules of Practice and Procedure discussed, modified, and adopted the notes submitted in developing these staff notes.

Division (B): Discovery: Right To Copy or Photograph

This division expands the State's duty to disclose materials and information beyond what was required under the prior rule. All disclosures must be made prior to trial. This division also requires the materials to be copied or photographed as opposed to inspection as permitted under the prior rule. Subject to several exceptions, the State must provide pretrial disclosure of all materials as listed in the enumerated divisions.

Division (C): Prosecuting Attorney's Designation of "Counsel Only" Materials

The State is empowered to limit dissemination of sensitive materials to defense counsel and agents thereof in certain instances. Documents marked as "Counsel Only" may be orally interpreted to the Defendant, or to counsel's agents and employees, but not shown or disseminated to other persons. The rule recognizes that defense counsel bears a duty as an officer of the court to physically retain "Counsel Only" material, and to limit its dissemination. Counsel's duty to the client is not implicated, since the rule expressly allows oral communication of the nature of the "Counsel Only" material.

Division (D): Prosecuting Attorney's Certification of Nondisclosure

This division provides a means to prevent disclosure of items or materials for limited reasons. The prosecution must be able to place reasonable limits on dissemination to preserve testimony and evidence from tampering or intimidation, and certain other enumerated purposes. The new rule explicitly recognizes that it is

the prosecution's duty to assess the danger to witnesses and victims, and the need to protect those witnesses and victims by controlling the early disclosure of certain material, subject to judicial review.

A nondisclosure must be for one of the reasons enumerated in the rule, and must be certified in writing to the court. The certification need not disclose the contents or meaning of the nondisclosed material, but must describe it with sufficient particularity to identify it during judicial review as described in division (F).

The certification process recognizes the unique nature of sex crimes against children. In the event of a certification of nondisclosure, defense counsel will have the right to inspect the statement no later than the seven-day review hearing provided in subsection (F), which is an improvement from the prior Criminal Rule 16 (B)(1)(g).

Finally, the rule recognizes that not every eventuality can be anticipated in the text of a rule, and allows nondisclosure in the interest of justice.

Division (E): Right of Inspection in Cases of Sexual Assault

This division recognizes the intensely personal nature of a sexual assault, and provides a special mechanism for discovery in such cases. It represents an exception to division (B).

The compromise between the interests in the privacy and dignity of the victim are balanced against the right of the defendant to a thorough review of the State's evidence by permitting inspection, but not copying, of certain materials. Upon motion of the defendant, the court may, in its discretion, permit these materials to be provided under seal to defense counsel and the defendant's expert.

In cases involving the sexual abuse of a child under the age of 13, upon motion and for good cause shown, the trial court may order dissemination of the child's statement under seal and pursuant to protective order to defense counsel and the defendant's expert. This provision facilitates meaningful communication between defense counsel and the defense expert, and to permit timely compliance with division (K) of the rule.

Division (E)(2) is intended to give sufficient time for an expert to evaluate the statement, and also to permit defense counsel to consult with the expert on the content of the statement and issues related to it. This division is designed to provide an exception to the nondisclosure procedure sufficient to permit the expert and defense counsel to effectively evaluate the statement. The protective order shall apply to defense counsel and defendant's experts and agents.

Division (F): Review of Prosecuting Attorney's Certification of Non-Disclosure

This division provides for judicial review at the trial court level of a prosecutor's certification of nondisclosure. As in many other executive branch decisions the standard for review, subject to constitutional protections, is an abuse of discretion - that is, was the prosecutor's decision unreasonable, arbitrary or capricious?

The prosecution of a case is an executive function. The rule's nondisclosure provision is a tool to ensure the prosecutor is able to fulfill that executive function. The prosecutor should possess extensive knowledge about a case, including matters not properly admissible in evidence but highly relevant to the safety of the victim, witnesses, or community. Accordingly, the rule vests in the prosecutor the authority for seeking protection by the nondisclosure, and deference when making a good faith decision about unpredictable prospective human behavior.

The review is conducted in camera on the objective criteria set out in division (D), seven days prior to trial, with defense counsel participating. If the Court finds an abuse of discretion, the material must be immediately disclosed to defense counsel. If the Court does not find an abuse of discretion, the material must nonetheless be disclosed no later than the commencement of trial. Further judicial review is provided by giving the prosecutor a right to an interlocutory appeal of an order of disclosure as provided for in Criminal Rule 12 (K), which is amended to accommodate that process.

Upon motion of the State, the certification of nondisclosure or "Counsel Only" designation is reviewable by the trial judge in the in camera proceeding. The preferred practice is to record or transcribe the in camera review to preserve any issues for appeal and sealed to preserve the confidential nature of the information.

The in camera review is set seven days prior to trial so that it is, in essence, the end of the trial preparation stage. There was substantial debate regarding the time for this review. Seven days provides adequate opportunity for the defense to prepare for trial and respond to the content of any nondisclosed material. The protective purpose of this process would be destroyed if courts routinely granted continuances of a trial date after conducting the seven-day nondisclosure review. The Commission anticipated that continuances of trial dates would occur only in limited circumstances.

Division (F)(4) seeks to protect victims of sexual assault who are still in their tender years.

Division (G): Perpetuation of Testimony

This division provides that if after judicial review the Court orders disclosure of evidence, the prosecutor upon motion to the Court is given a right to perpetuate testimony in a pretrial hearing as set forth in the subsection.

Division (H): Discovery: Right to Copy or Photograph

The previous rule allowed for disclosure of specified relevant evidence in the possession of defense counsel to the State upon the State's motion. This division expands defense counsel's duty to disclose materials and information beyond what was required under the prior rule. In this division a reciprocal duty of disclosure now arises upon defense counsel's motion for discovery without further demand from the State. This division requires the materials to be copied or photographed, as opposed to the prior rule that only allowed for inspection by the State. Subject to several exceptions covered in division (J), defense counsel must provide pretrial disclosure of materials as listed in the enumerated subsections. This division seeks to define the defense counsel's reciprocal duty of disclosure while respecting the constitutional and ethical obligations required in representing a client.

For the first time, defense counsel has a duty to provide the State with evidence that tends to support innocence or alibi. This allows the State to properly assess its case, and re-evaluate the prosecution. The Commission believes this provision will facilitate meaningful plea negotiation and just resolution.

Division (I): Witness List

This division imposes an equal duty on each party to disclose the list of witnesses that will be called at trial. It prohibits counsel from commenting on the witness lists but does not prohibit the commenting upon the absence or presence of a witness relevant to the proceeding. See, State v. Hannah, 54 Ohio St.2d 84, 374 N.E.2d 1359 (1978).

Division (J): Information Not Subject to Disclosure

This division clarifies what information is not subject to disclosure by either party for reasons of confidentiality, privilege, or due to their classification as documents determined to be work product. This division also references that the disclosure or nondisclosure of grand jury testimony is governed by Rule 6 of the Rules of Criminal Procedure.

Division (K): Expert Witnesses; Reports

The division requires disclosure of the expert witness's written report as detailed in the division no later than twenty-one days prior to trial. Failure to comply with the rule precludes the expert witness from testifying during trial. This prevents either party from avoiding pretrial disclosure of the substance of expert witness's testimony by not requesting a written report from the expert, or not seeking introduction of a report. This division does not require written reports of consulting experts who are not being called as witnesses.

Division (L): Regulation of Discovery

The trial court continues to retain discretion to ensure that the provisions of the rule are followed. This discretion protects the integrity of the criminal justice process while protecting the rights of the defendants, witnesses, victims, and society at large.

In cases in which a defendant initially proceeds pro se, the trial court may regulate the exchange of discoverable material to accommodate the absence of defense counsel. Said exchange must be consistent with and is not to exceed the scope of the rule. In cases in which the attorney-client relationship is terminated prior to trial for any purpose, any material designated "Counsel Only" or limited in dissemination by protective order must be returned to the State. Any work product derived from such material shall not be provided to the defendant.

The provisions of (L)(2) and (L)(3) are designed to give the court greater authority to regulate discovery in cases of a pro se defendant and addresses the problems that could arise if a defendant terminates the employment of his attorney and then demands everything in the attorney's file. This could frustrate the protections built into the rule to avoid release of material directly to the defendant in some cases.

Section (M): Time of Motions

This division requires timely compliance with all provisions of this rule subject to judicial review. Adherence to the requirements of this division will help to ensure the fair administration of justice.